

Statement of Daniel J. Dell'Orto  
Principal Deputy General Counsel  
Office of General Counsel  
U.S. Department of Defense

Thank you, Mr. Chairman, Ranking Member McCain, and Members of the Committee for the opportunity to testify before you today regarding individuals detained by the Department of Defense as unlawful enemy combatants.

Dr. Samuel Johnson, the esteemed English philosopher, poet and critic, famously tells us, "The law is the last result of human wisdom acting upon human experience for the benefit of the public." The Military Commissions Act, developed by the President and the Congress in light of the Supreme Court's decision in *Hamdan v. Rumsfeld*, in conjunction with the other procedures implemented by the U.S. government relating to the determination of detainee status, represent precisely this combination of wisdom, experience, and concern for the public interest. The MCA provides a system whereby alien unlawful enemy combatants accused of violations of the law of armed conflict will be tried fairly, while ensuring the national security of the United States and allowing the continued prosecution of the Global War on Terrorism. Similarly, the Combatant Status Review Tribunal and Administrative Review Board processes provide the detainees with a measure of process significantly beyond that which is required by international law.

The United States is in a state of armed conflict with Al Qaida, the Taliban and their supporters. During this conflict, persons have been captured by the United States and its allies, and some of those persons have been detained as enemy combatants. The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principal purpose of this detention is to prevent the persons from returning to the battlefield, as some have done when released.

Detention of enemy combatants in wartime is not criminal punishment and therefore does not require that the individual be charged or tried in a court of law. It is a matter of security and military necessity that has long been recognized as legitimate under international law.

The U.S. relies on commanders in the field to make the initial determination of whether persons detained by U.S. forces qualify as enemy combatants. Since the war in Afghanistan began, the United States has captured, screened and released approximately 10,000 individuals. Initial screening has resulted in only a small percentage of those captured being transferred to Guantanamo. The United States only wishes to hold those who are enemy combatants who pose a continuing threat to the United States and its allies.

In addition to the screening procedures used initially to screen detainees at the point of capture, the Department of Defense has created 2 administrative review processes at Guantanamo: Combatant Status Review Tribunals and Administrative Review Boards.

The Combatant Status Review Tribunal (CSRT) is a formal review process, created by the Department of Defense and incorporated into the Detainee Treatment Act of 2005, that provides the detainee with the opportunity to have his status considered by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially. The CSRTs provide significant process and protections. In addition to the opportunity to be heard in person and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process. Furthermore, a CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal. Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority, empowered to return the record to the tribunal for further proceedings. In addition, a CSRT decision can be directly appealed to an American domestic federal civilian court – the United States Court of Appeals for the District of Columbia Circuit. Providing review of an enemy combatant determination in a nation's own domestic courts is an unprecedented protection in the history of war.

In addition to the CSRT, an Administrative Review Board (ARB) conducts an annual review to determine the need to continue the detention of the enemy combatant. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention – intelligence value, as an example. Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released, or be transferred to his country of nationality. The ARB process is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

Approximately 390 detainees have been released or transferred out of Guantanamo Bay. Approximately 80 detainees are awaiting transfer or release once their governments provide credible assurances that they will be treated humanely and that the countries will take steps to mitigate the threat those individuals pose to the United States and its allies. This underscores our commitment not to hold any detainee longer than necessary.

Where appropriate, the President has indicated that military commissions should be used to try those suspected of serious war crimes. As you're likely aware, criminal charges were referred this week against a Guantanamo detainee who is accused of, among other things, murdering a U.S. soldier. This individual, and others to follow, will face trial under the military commission procedures found in the Military Commissions Act of 2006. Transferring trials before military commission from the secure facility at Guantanamo Bay, Cuba, to the continental United States would hamstring the nation's ability to prosecute terrorist war crimes. The existing civilian court system is ill-

equipped to handle the dispensation of justice in the chaotic and irregular circumstances of armed conflict. Rules of evidence and procedure designed for information derived from civilian law enforcement investigations are impracticable for the trial of accused terrorist war criminals. Much of the evidence against these accused war criminals was collected on foreign battlefields, where reading *Miranda*-style rights warnings and obtaining court-issued search warrants would be impossible and would, in any case, cripple intelligence-gathering efforts. For this reason, this nation has, since the earliest days of the Republic, used military commissions as a means to try enemy combatants during wartime.

The system created by the MCA and implemented by the Office of Military Commissions is designed to provide for prosecution of accused war criminals before regularly constituted courts affording all the judicial guarantees recognized as indispensable by civilized peoples. The MCA and the Manual for Military Commissions provide extensive procedural guarantees to commissions defendants, including: presumption of innocence until proven guilty beyond a reasonable doubt, trial before a commission made up of at least 5 members (12 in capital cases) and an impartial military judge, the ability to call witnesses and present evidence, the ability to cross-examine prosecution witnesses, the privilege against self incrimination, the opportunity to be represented free of charge by a military defense counsel with attorney-client privilege, the option of retaining certain additional civilian defense counsel, the right to represent oneself, the right to be present at all sessions of the military commission in which evidence is introduced before the commission, and an extensive appeals process, including ultimate access to our own domestic courts. The current system thus provides an accommodation to unlawful enemy combatants, beyond what is required by the Geneva Conventions and indeed, unprecedented in the history of war.

To abandon this carefully crafted system and attempt to transplant the trials of enemy combatants into the civilian courts would be ill advised, as would be transplanting the commissions themselves from the secure facility at Guantanamo to some unspecified location in the United States. The media circus and massive disruptions that developed around the trial of terrorism defendant Zacharias Moussaoui in Alexandria, Virginia, were but a small foretaste of what could be expected to surround U.S.-based trials of persons accused of the most serious acts of terrorism. Holding these trials at a stateside military installation would only serve further to concentrate the congestion and chaos that would surround them, effectively shutting down part or all of a secure, operational military base during wartime. If commission defendants were to be transported to the United States for trial, significant additional security and logistical resources would have to be committed to the transport mission—it would not be a simple matter of putting one person on a plane and hoping he would show up for trial.

In the nine months since the Supreme Court's *Hamdan* decision, the Congress and the Administration have made great strides in moving forward. Congress drafted and enacted legislation. The President signed that legislation into law. The courts have begun ruling on that legislation and have rejected challenges to the Act. Military commissions have begun again and are proceeding in earnest. The Department has been

criticized for the delay in conducting military commissions. We are now moving forward. It would be worse than counterproductive to make any changes to the legislation at this point, while the courts are actively engaged in reviewing the MCA and Military Commissions are hearing cases.

Together, Congress and the President developed the Detainee Treatment act and the Military Commissions Act. Those statutes, along with the CSRT and ARB processes, represent the result of the combined wisdom of the President, the Congress, and numerous military and civilian personnel, applied to the nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice, fairly and lawfully administered, while safeguarding the security of the American people. To discard this system, or any element of it, would be to ignore wisdom and experience, and doing so would do a disservice to the American public.